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No. 84-1304

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE SYNANON CHURCH, CHARLES E. DEDERICH,
Petitioners,

vs.

READER'S DIGEST ASSOCIATION, INC.,
DAVID MACDONALD,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a libel case governed by *New York Times Co.* v. *Sullivan,* is summary judgment correctly granted to the defendants when the record, construed in the light most favorable to the plaintiffs, contains no evidence from which a reasonable jury could find "actual malice" (i.e., any knowledge of falsity or an awareness of probable falsity)?

2. Are plaintiffs public figures under *New York Times Co.* v. *Sullivan* when the uncontradicted evidence demonstrates that they engaged in massive publicity efforts to obtain a favorable public reputation for themselves and for their drug rehabilitation efforts, and that they voluntarily injected themselves into public controversy over the effectiveness of their efforts?

TABLE OF CONTENTS

	Page
Statement of the case	1
Argument	4
I. The decision of the California Supreme Court is in accord with decisions of this Court, the Federal Courts of Appeal and the state courts, all of which agree that summary judgment should not be granted if there exists a triable issue of fact	4
A. The California court expressly recognized that all inferences should be resolved in favor of the party opposing the motion for summary judgment; it did not weigh the evidence, evaluate credibility nor resolve factual questions	4
B. The decision of the California Supreme Court is in accord with other decisions reviewing summary judgments in First Amendment libel cases	5
II. There is no evidence of actual knowledge of falsity or a high degree of awareness of probable falsity	8
A. The California Supreme Court correctly determined that none of petitioners' purported evidence, whether viewed individually or cumulatively, could support a finding of actual malice	8
B. The "evidentiary rules" applied by the court below are in accord with the decisions of other courts	9
III. Petitioners are public figures	13
Conclusion	15

TABLE OF CASES

	Page
Beamer v. Nishiki, 670 P.2d 1264	6
Bose Corp. v. Consumers Union of U.S., Inc., 104 S.Ct. 1949	7
Calder v. Jones, 104 S.Ct. 1482	5
Curtis Publishing Co. v. Butts, 388 U.S. 130	10
Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438	6
In re Sealed Case, 1 Law Man.Prof.Conduct 651	14
Kuhn v. Tribune-Republican Pub. Co., 637 P.2d 315	11
Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563	6, 7, 12
New York Times Co. v. Sullivan, 376 U.S. 254	3
Rebozo v. Washington Post Co., 637 F.2d 375	4, 6
Schultz v. Newsweek, Inc., 668 F.2d 911	6
Sealed Case, In re, 1 Law Man.Prof.Conduct 651	14
St. Amant v. Thompson, 390 U.S. 727	8, 10
Stevens v. Sun Pub. Co., 270 S.C. 65, 240 S.E.2d 812	11
Synanon Church v. United States, 579 F.Supp. 967	14
Yiamouyiannis v. Consumers U. of United States, 619 F.2d 932	6

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STATEMENT OF THE CASE

Petitioners' statement of the case contains many assertions not supported by, or contrary to, the record. The relevant facts, most of which are summarized in the opinion of the California Supreme Court (Pet.Appx., pp. 1a-7a), are as follows:

Respondents are the publisher and author of an article which appeared in the July 1981 edition of the Reader's Digest (pp. 16-19).[1] The article, entitled *The Little Paper That Dared,* described how a small California weekly newspaper (The Point Reyes Light) won the Pulitzer Prize for a series of articles critical of petitioner Synanon

[1]Unless otherwise indicated, citations are to the Appendix record in the court below.

and its founder-leader, petitioner Dederich (id.).[2] The Pulitzer Committee determined that the newspaper performed "meritorious public service" in its "pioneering expose" of the "quasi-religious, corporate cult" Synanon (p. 603).

Since its founding in 1958, Synanon received enormous publicity as an apparently successful rehabilitation center for drug addicts (e.g., pp. 832-934, 945-1016, 1136-1137, 1140-1144, 1148-1156, 1189, 1199-1483). Respondents' article recounted Synanon's history and discussed its transformation into an "alternative life-style community" (p. 18). It also reported Synanon's adoption of a policy of physical violence to intimidate its perceived enemies (pp. 18-19). Specific examples were cited: an assault on a former member when he returned to visit the Synanon facilities, a similar attack on another member who left Synanon when he refused petitioner Dederich's orders to have a vasectomy, Synanon's purchase of $62,000 of guns and ammunition to arm a private police force, Synanon's formation of a squad of "Imperial Marines" to intimidate Synanon foes, and Synanon's attack on an attorney, Paul Morantz, who was bitten by a rattlesnake placed in his mailbox by two Synanon Imperial Marines after his successful prosecution of a lawsuit against Synanon (id.). Petitioner Dederich and the two Synanon Imperial Marines were charged with and convicted of conspiracy to commit murder (pp. 721-732); petitioner Dederich remains on probation in relation to that crime.

Petitioners sued respondents for libel, but they did not challenge any of the serious charges of misconduct described above. Rather, they challenged only the following three sentences in the article:

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[2]Copies of the article have been lodged with the Clerk of the Court.

> "Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted wide publicity and enough cash donations to start a string of addiction centers.
>
> • • • • •
>
> "Since 1968, minimal drug rehabilitation work had been attempted; funds, however, were still solicited on that basis" (p. 4).

Petitioners assert that these sentences are "uniquely defamatory" to their "reputations and incomes" because they affect their ability to solicit funds from the public (Pet., pp. 4-5).[3]

Respondents moved for summary judgment on the ground that petitioners were public figures and that, under this Court's decision in *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, there was no evidence of "actual malice," that is, publication with actual knowledge of falsity or a high degree of subjective awareness of probable falsity.[4] Although the trial court viewed the issue as "close," it denied the motion (Pet.Appx., p. 6a). The California Supreme Court granted review and, after an extensive review of the law and the evidence, it concluded that:

> "None of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided him by his sources. The sources themselves were persons of good, indeed distinguished, reputation. There is nothing at

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[3]Contrary to petitioners' assertion (Pet., p. 5, n. 3), their complaint raised no issues and made no allegations regarding any other portions of the article (see pp. 1-13).

[4]The evidence pertaining to petitioners' claims of "actual malice" is discussed in the argument which follows (infra, pp. 8-13).

all in the record to suggest that MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or the truth of the challenged statements" (Pet.Appx., pp. 59a-60a).

The court ordered that judgment be entered in favor of respondents.

ARGUMENT

I. THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN ACCORD WITH DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEAL AND THE STATE COURTS, ALL OF WHICH AGREE THAT SUMMARY JUDGMENT SHOULD NOT BE GRANTED IF THERE EXISTS A TRIABLE ISSUE OF FACT.

A. The California court expressly recognized that all inferences should be resolved in favor of the party opposing the motion for summary judgment; it did not weigh the evidence, evaluate credibility nor resolve factual questions.

The fundamental premise which underlies the petition—that the California Supreme Court enunciated "an unprecedented and virtually insurmountable barrier to a libel plaintiff" (Pet., p. 10)—is false. Contrary to petitioners' assertions, the California court expressly recognized that "• • • summary disposition is *not* appropriate if a triable issue of fact exists" (Pet.Appx., p. 8a) (emphasis added). Further, the California court quoted with approval from the Fifth Circuit's opinion in *Rebozo* v. *Washington Post Co.* (5 Cir. 1981) 637 F.2d 375:

> "'[T]he standard of review of First Amendment defamation actions, *as in all summary judgment cases*, is whether the record, *construed in a light most favorable to the party against whom the judgment has been entered*, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party'" (Pet.Appx., p. 11a) (emphasis added).

Hence, there is utterly no basis for petitioners' claims that the decision below departs from the procedural rules governing summary judgment motions.

B. The decision of the California Supreme Court is in accord with other decisions reviewing summary judgments in First Amendment libel cases.

In declining to grant "special *procedural* protections to defendants in libel and defamation actions," this Court has emphasized that "the potential chill on protected First Amendment activity * * * is already taken into account in the constitutional limitations on the *substantive* laws governing such suits" (*Calder* v. *Jones* (1984 ..... U.S. ....., 104 S.Ct. 1482, 1488) (emphasis added). The California court's decision follows this Court's ruling; it recognizes that no special procedural rules exist in First Amendment libel cases (supra, pp. 4-5), and it enforces the substantive law governing such suits. Referring to the "potential chilling effect from protracted litigation," the court below cautioned:

> "That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence" (Pet.Appx., p. 12a).

This ruling is in accord with opinions of federal and state courts, *including* those (cited at Pet., p. 15) in which petitioners purport to find a "conflict." For example, the Second Circuit has declared that:

> "[A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury

> could find malice with convincing clarity' " (*Yiamouyiannis* v. *Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940) (emphasis deleted).

To the same effect: *Rebozo* v. *Washington Post Co.* (5 Cir. 1981) 637 F.2d 375, 381, certiorari denied (1981), 454 U.S. 964; *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael* (9 Cir. 1974) 492 F.2d 438, 441, certiorari denied (1974) 419 U.S. 872; *Schultz* v. *Newsweek, Inc.* (6 Cir. 1982) 668 F.2d 911, 917; *Beamer* v. *Nishiki* (Haw. 1983) 670 P.2d 1264, 1273.

Hence, the courts generally *agree* with respect to the procedural and the substantive constitutional law to be applied in summary judgment proceedings. Petitioners, however, make much of the California court's reference to "favored remedy" (see Pet., pp. 10, 14-15), but they ignore the context of that reference. The court first observed that, "It is pointless to declare in the abstract that summary judgment is a favored or disfavored remedy" (Pet.Appx., pp. 10a-11a). Then, after holding that the substantive law governing defamation actions under the *New York Times* rule should apply in summary judgment proceedings, the court noted that, "*To this extent,* therefore, summary judgment remains a 'favored' remedy" (emphasis added) (Pet.Appx., p. 13a). Thus, the opinion below is clear in its holding that no special procedural remedies exist.[5]

Petitioners also rely upon the recent decision in *Liberty Lobby, Inc.* v. *Anderson* (D.C.Cir. 1984) 746 F.2d 1563 (see Pet., pp. 12-14), but that case presents no real conflict with the decision below. There, the Court of Appeals—like the California court—conducted an extensive review of the evidence pertaining to actual malice. While conclud-

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[5]If there can be said to be any disagreement here, it is in dicta on terminology as to denominating application of the substantive constitutional law as a "neutral" approach (*Yiamouyiannis* v. *Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940) or a "favored" one ("to this extent").

ing that triable issues of fact existed as to a few of the actual malice allegations (746 F.2d 1577-1579), it affirmed the grant of summary judgment as to a large number of those allegations (746 F.2d 1575-1577).

Although petitioners seize upon the *Liberty Lobby* court's dictum that the "clear and convincing" test is not applicable at the summary judgment stage (see 746 F.2d 1570-1571), that dictum presents no issue here. In recognizing that other courts have concluded that the "clear and convincing" standard does apply at the summary judgment stage, the *Liberty Lobby* court stated: "[T]hose courts' analyses of the facts demonstrate that they rested their decisions upon lack of evidence of malice, not upon lack of 'convincing clarity' in that evidence" (746 F.2d 1571). That is precisely the conclusion reached by the California Supreme Court after its thorough review of the evidence in this case:

> "There is *nothing at all* in the record to suggest that [author] MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or the truth of the challenged statements" (Pet.Appx., pp. 59a-60a) (emphasis added).

As the review of the evidence in the following section demonstrates, that conclusion is correct. Therefore, the result in this case would not differ whether or not the constitutionally-required "clear and convincing" evidence standard is applied at the summary judgment stage.[6]

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[6]With respect to the question whether the "clear and convincing" standard applies on a motion for summary judgment, the *Liberty Lobby* court misread this Court's decision in *Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) ... U.S. ..., 104 S.Ct. 1949. The *Liberty Lobby* opinion states that, under *Bose*,

> "[J]udges are not merely to determine whether the finder of fact could reasonably find such 'convincing clarity' to exist, but are 'independently [to] decide' that point" (746 F.2d 1570).

The court concluded that, therefore, a plaintiff would be forced to "try his entire case" on a motion for summary judgment (746 F.2d

II. THERE IS NO EVIDENCE OF ACTUAL KNOWLEDGE OF FALSITY OR A HIGH DEGREE OF AWARENESS OF PROBABLE FALSITY.

A. The California Supreme Court correctly determined that none of petitioners' purported evidence, whether viewed individually or cumulatively, could support a finding of actual malice.

Contrary to petitioners' assertions (Pet., pp. 17-18), the California court expressly recognized that:

> "[A]ctual malice can be proved by circumstantial evidence. '[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity'" (Pet.Appx., pp. 30a-31a).

The California court stressed (Pet.Appx., p. 32a), in accord with this Court's rulings, that evidence of actual malice must bear upon the subjective attitude of the defendant; it must permit the conclusion that "the defendant in fact entertained serious doubts as to the truth of his publication" (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 731). Because none of petitioners' purported evidence, considered individually or cumulatively, indicated any such subjective awareness of falsity, the court correctly concluded that summary judgment should be granted.[7]

1570). But the *Liberty Lobby* court's concern is unfounded. Under *Bose*, judges must determine whether the evidence is *constitutionally sufficient to support a finding of actual malice;* this does not involve any weighing or reweighing of the evidence (... U.S. ..., 104 S.Ct. 1965). A libel plaintiff need not marshall all his evidence in opposing summary judgment, but rather he is required to bring forth *some* evidence which meets the substantive standard applicable in First Amendment libel cases, i.e., evidence from which a reasonable jury could find malice with convincing clarity.

[7]Petitioners falsely imply that the court below looked only for *direct* evidence of actual malice (Pet., p. 17, n. 12). In fact, after the court concluded that there was *no* such direct evidence (which petitioners do not dispute), it reviewed *all* of petitioners' purported circumstantial evidence (Pet.Appx., pp. 33a-55a).

B. The "evidentiary rules" applied by the court below are in accord with the decisions of other courts.

Petitioners erroneously assert that the California Supreme Court "eliminated" certain classes of evidence "as probative of actual malice" (Pet., p. 19). However, the Court merely concluded that *petitioners'* purported evidence was not sufficient in this case. We discuss each of petitioners' "examples" seriatim:

1. *"Deletion of facts"* (Pet., pp. 19-20): Although a deletion of facts which go to the essence of the claimed libel may be evidence of actual malice, it is evident that deletion of *peripheral* or *irrelevant* material cannot constitute such evidence. Here, the uncontradicted record shows that the deleted phrase to which petitioners refer ("one time heroin user") was irrelevant. When question was raised during the editorial process about deletion of the phrase, the research editor indicated in a marginal note that it was "not necessary p. 196—book" (p. 350). The "book" reference noted by the researcher (p. 660, subpage 196) shows that the "cure" of Mr. Hurst, a former Synanon director who defected, had occurred in 1959. Hence, that "cure" is irrelevant to respondents' report that, "[s]ince *1968*, minimal drug rehabilitation work had been attempted" (p. 18).

2. *Evidence of a "predisposition"* (Pet., p. 20): Petitioners first discuss evidence to which reference was *never made in the court below* (see Pet., pp. 9, 20). In any event, that evidence (an editor's regret that his prior reports on petitioners had not been published) shows no subjective awareness of probable falsity.[8] Further, author MacDon-

[8]Petitioners now claim that they should be entitled to depose this editor and others peripherally involved in the editorial process (Pet., p. 9, n. 8). However, petitioners made no argument before the California Supreme Court about any supposed need to depose specific individuals. Instead, they merely cited a trial court brief. Nor did petitioners avail themselves of the opportunity of filing a petition for rehearing to point out the supposed "error" in this or any other regard (see Pet., p. 22, n. 16).

ald's expression of opinion that "Synanon seems very, very nasty indeed, and litigious as hell" (p. 1618) also is irrelevant (see Pet., pp. 6, 20). As the court below pointed out,

> "At the time he wrote the letter, * * * MacDonald was well into the preparation of his article; he was aware of Synanon's hoarding of arms, the assaults upon former members, the burning of the house of a former member, the rattlesnake attack on Attorney Morantz, and of Synanon's numerous lawsuits" (Pet.Appx., p. 39a).

Notably, petitioners do not and cannot deny either that the cited events occurred or that the author was aware of them. His reaction does not suggest any doubt about the article's truth.[9]

The cases cited by petitioners in this regard (Pet., p. 20) are inapposite. They simply hold that evidence of a preconceived plan to attack the plaintiff may be admissible to show actual malice when coupled with other evidence of a subjective state of mind. Thus, for example, a plan to publish "muckraking" exposes, accompanied by knowledge that the sole source is dishonest, may show actual malice (see *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 157, 169). No such evidence exists here.

3. *"Failures in investigation, including refusal to contact subject"* (Pet., pp. 21-22): The law is clear that a failure to investigate is not itself sufficient to show actual malice (*St. Amant* v. *Thompson* (1967) 390 U.S. 727, 733). There must also be evidence which affirmatively shows subjective knowledge of falsity on the part of the defendant (e.g., *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130,

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[9]Petitioners also imply that the author's research notes show that their rehabilitation program was effective (see Pet., p. 6). They omit those portions of the notes which show that it was not (see Pet.Appx., p. 41a, n. 12).

157, 169 (knowledge of dishonesty of sole source); *Kuhn* v. *Tribune-Republican Pub. Co.* (Colo. 1981) 637 P.2d 315, 319 (reporter admitted that he had "no basis for most of his erroneous statements"); *Stevens* v. *Sun Pub. Co.* (1978) 270 S.C. 65, 240 S.E.2d 812, 815 (source "known to be suspect")).

Here, there is a total absence of any such evidence. Indeed, the uncontradicted evidence demonstrated that respondents' sources were responsible and reputable individuals (see Pet.Appx., pp. 33a-34a).[10] The evidence also demonstrated precisely why no one contacted petitioners. The Digest research editor talked directly with rattlesnake victim Paul Morantz as well as a former Synanon member who had been kidnapped and beaten by Synanon members (p. 291). She also reviewed a tape recording, admitted by petitioners to be genuine, in which petitioner Dederich exhorted Synanon members to inflict bodily injury upon opposing lawyers and their families (p. 290).[11] She con-

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[10]Petitioners note that respondents were aware that petitioners had filed suit against the "primary sources" for the article (Pet., p. 7). However, respondents were also aware that the suit was unprosecuted (p. 2501), and that petitioners had a policy of filing suit against almost everyone who mentioned them in even a slightly critical manner (see Pet.Appx., pp. 38a-39a).

[11]In that tape, Dederich declared:

> "[O]ur religious posture is, don't mess with us. You can get killed. Dead. Physically dead. And we're gonna crack some bones. * * * I want to get some son of a bitch in the basement. Really. And I really do want an ear in a glass of alcohol on my desk. * * *
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> * * * * *
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> "* * * I'm quite willing to break some lawyer's legs and then tell him the next time I'm going to break your wife's legs. Then I'm going to cut your kid's arm off. And try me, because this is only a sample, you son of a bitch, like that. And that's the end of your lawyer" (pp. 360-361, 368).

cluded that Dederich would not be an unbiased source and also that, because of his talk "about violence and killing," she did not want to meet him (pp. 2569-2570). The author of the article had similar knowledge of Synanon's activities, and he also knew that any attempt to contact petitioners would be futile: "Synanon wasn't answering calls of this kind" (p. 2448).[12]

4. *"Notification of its falsity"* (Pet., pp. 22-23): Although deliberate publication after a notice of specific verifiable facts may constitute evidence of actual malice, no such evidence exists here. The complaint was served on the Digest on January 26, 1982, and on author MacDonald on January 29, 1982. The Swedish and New Zealand issues of the Reader's Digest subsequently were distributed in February and March 1982, respectively. Even if a deliberate decision to go ahead with foreign distribution had been made (and none was shown), nothing in the complaint gave reason to question the accuracy of the article or the reliability of the sources. As the District of Columbia Circuit has noted with respect to a similar argument, "mere general allegations of falsity similar to those contained in the complaint do not suffice" (*Liberty Lobby, Inc.* v. *Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1569).

Moreover, respondents were aware that:

> "'Synanon's 40-member legal department often used the courts to silence articles and block efforts at governmental control.' A National News Council report described Synanon as using litigation 'for coercing the press into silence about Synanon and its affairs,' and

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[12]Petitioners make passing reference to two prior articles published in the Digest in 1970 (Pet., pp. 7-8, 21). Those articles dealt with matters occurring before 1968, and they were in no way contradictory to the article published in 1981 (Pet.Appx., p. 41a, n. 12; see pp. 1924-1935).

> the Pulitzer Prize Committee, in awarding the prize to the Mitchells, praised their refusal to yield to threats of lawsuits" (Pet.Appx., pp. 38a-39a).

It would be ironic indeed if petitioners' litigation and other efforts to deter publication were converted into evidence of actual malice.

5. *Sources "casting doubt" on reports* (Pet., pp. 23-24): Here, petitioners engage in their most egregious misrepresentations of the record. They seize upon testimony relating to whether certain precise words were stated by Reader's Digest sources (see Pet., pp. 7, 23-24, 70a-80a), and they wholly ignore the evidence, both in testimony and writings, which shows that the article was an entirely accurate report. These matters are fully discussed in the opinion below (see Pet.Appx., pp. 41a, n. 12, 42a-55a). We note here only that petitioners' claims are refuted by their own admissions. As petitioner Dederich declared in 1977:

> "We are *not,* a, a, a rehabilitation place * * * for dope fiends. We're, we're not. We stopped being that a long, long time ago. Very, very little of our energy goes into that situation. Almost none. * * * [T]hat notion is, is ten to twelve years old, that we are somehow a rehab place for dope fiends. * * *
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> * * * * * *
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> "* * * [W]e can't call ourselves any kind of a rehab place. * * * We say that, we're lying, we're just lying" (pp. 3459, 3464) (emphasis in original).

In view of such admissions, petitioners cannot claim that others who reached similar conclusions did so maliciously.

III. PETITIONERS ARE PUBLIC FIGURES.

Petitioners falsely assert that there was "no pending public controversy" about them or their works (Pet., p. 27). The opinion below reviews in detail the publicity which was

sought and obtained by petitioners, and it discusses the public controversy which arose about the effectiveness of their rehabilitation program (Pet.Appx., pp. 22a-25a).[13] The record is replete with uncontradicted evidence pertaining to petitioners' well-publicized criminal violence and other criminal activities (see pp. 1198-1213, 1227, 1243-1244, 1254, 1261, 1362-1363, 1368-1369, 1432).[14]

This is not, as petitioners would have it (Pet., p. 26), the case of an unwilling participant in a newsworthy event. Rather, petitioners' own voluntary acts and their own deliberate injection of themselves into the continuing public controversy about them and their self-declared public "good works" demonstrate beyond cavil that they are public figures. As the court below observed:

> "Synanon and its founder have sponsored massive publicity and self-promotion efforts over a period of many years and apparently *increased* these efforts with regard to the present controversy. As such, they enjoyed remarkable access to the media through which to counter any criticisms they deemed to be unwarranted and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus they have clearly met the standards for 'public figure' status for purposes of this defamation action" (Pet.Appx., pp. 25a-26a) (emphasis by court).

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[13]The opinion also notes, but it does not base its public figure conclusion upon, petitioners' judicial admissions of their notoriety (see Pet.Appx., p. 22a, n. 7).

[14]Indeed, petitioners concede that "many allegations of violence and misconduct * * * have been published for many years about Synanon and Mr. Dederich" (Pet., p. 4). Petitioners' criminal misconduct has also been judicially noted (see *In re Sealed Case* (D.C. Cir. Feb. 8, 1985) (D.C.Misc.Docs. 84-0144, 84-0145) . . . F.2d . . ., 1 LawMan.Prof.Conduct 651; *Synanon Church* v. *United States* (D.D.C. 1984) 579 F.Supp. 967, 971-972).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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